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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1933.

No. 585.

JOHN POKORA, Petitioner,

vs.

THE WABASH RAILWAY COMPANY, a Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

ADDITIONAL BRIEF OF RESPONDENT.

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St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477

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On the oral argument of this case the petitioner was granted leave to have sent to the court a plat which was submitted to the Circuit Court of Appeals by petitioner upon the argument of the case in that court, which plat counsel for petitioner states was a copy of a plat offered in evidence on the trial of the case, but which was not incorporated in the bill of exceptions or in the transcript filed in the Circuit Court of Appeals, or in the transcript filed in this court, as respondent pointed out in its brief filed in this court on or before February 10, 1934. Counsel for the petitioner stated to the Court during the argument that he would have the original plat which was offered in evidence in the District Court sent to counsel for respondent to be used in connection with respondent's additional brief, which the Court granted respondent leave to file.

Counsel for respondent received from the Clerk of the United States District Court at Springfield, Illinois, a plat which is marked "Pl't'f. Ex. No. One. 6/22/32. L. M. J.," which plat is being forwarded to the clerk of this court with the respondent's additional brief. The respondent has reproduced from the said original Exhibit No. 1 a portion thereof, marked "Plat A," showing the place of the accident with the distances and locations of tracks, streets, curb lines, sidewalk, grass plot and buildings exactly as they appear upon petitioner's said Exhibit No. One, and has added to that reproduction the vision lines from two

points in Edwards street, so that said plat A, inserted opposite this page, shows the following:

(a) At a point marked with the figure 1 in a circle, seven feet and six inches south of the north curb line of Edwards street and ten feet east of the east rail of the switch track, the locomotive approaching on the main track could have been seen by petitioner 62 feet north of the point of the collision, if the south end of the box car on the switch track was five feet north of the north line of the north sidewalk at the point marked "A" in a circle.

(b) At the same point 1, the locomotive could have been seen by petitioner a distance of 67 feet north, if the south end of the box car was ten feet north of the north line of the north sidewalk, at the point marked B in a circle. These vision lines from point 1 are shown in yellow on the plat A.

(c) At the point marked by the figure 2 in a circle, seven feet six inches south of the extended north curb line of Edwards street and ten feet east of the east rail of the main track, the locomotive could have been seen by petitioner a distance of 129 feet north of the point of the collision, with the south end of the box car five feet north of the north line of the north sidewalk at point A.

(d) At the same point 2, the locomotive could have been seen by petitioner on the main track 143 feet north of the point of the collision, with the south end of the box car ten feet north of the north line of the north sidewalk, at point B. The vision lines from point 2 are shown in red on the plat.

"Reproduction Plaintiff's Exhi

L

① a point 7 ft. 6 inches South

② a point 7 ft. 6 inches South

Ⓐ = End of Freight car 5 ft

Ⓑ = End of Freight car 10 ft.

Vision Lines from point

Vision Lines from point

Ice Service Station

Platform

129'

WABASH R.R

Switch Ti

STREET

Switch

MAIN

67'

62'

8'

8'

17'-6"

C.I.P. Co.

Ice Plant

(Brick Building)

Sidewalk

Drive

25'

O pole

Curb level with Pavement

Grass Plot

7'-6"

7'-6"

Board plank Crossing

10'

10'

Macadam Pavement

EDWARDS STREET

Paved with Brick

30'

80'

End of Brick Pavement

Fire Hydrant

Curb Line

Poles

Crossing Sign

Grass Plot

38'

Cinder Walk

Switch

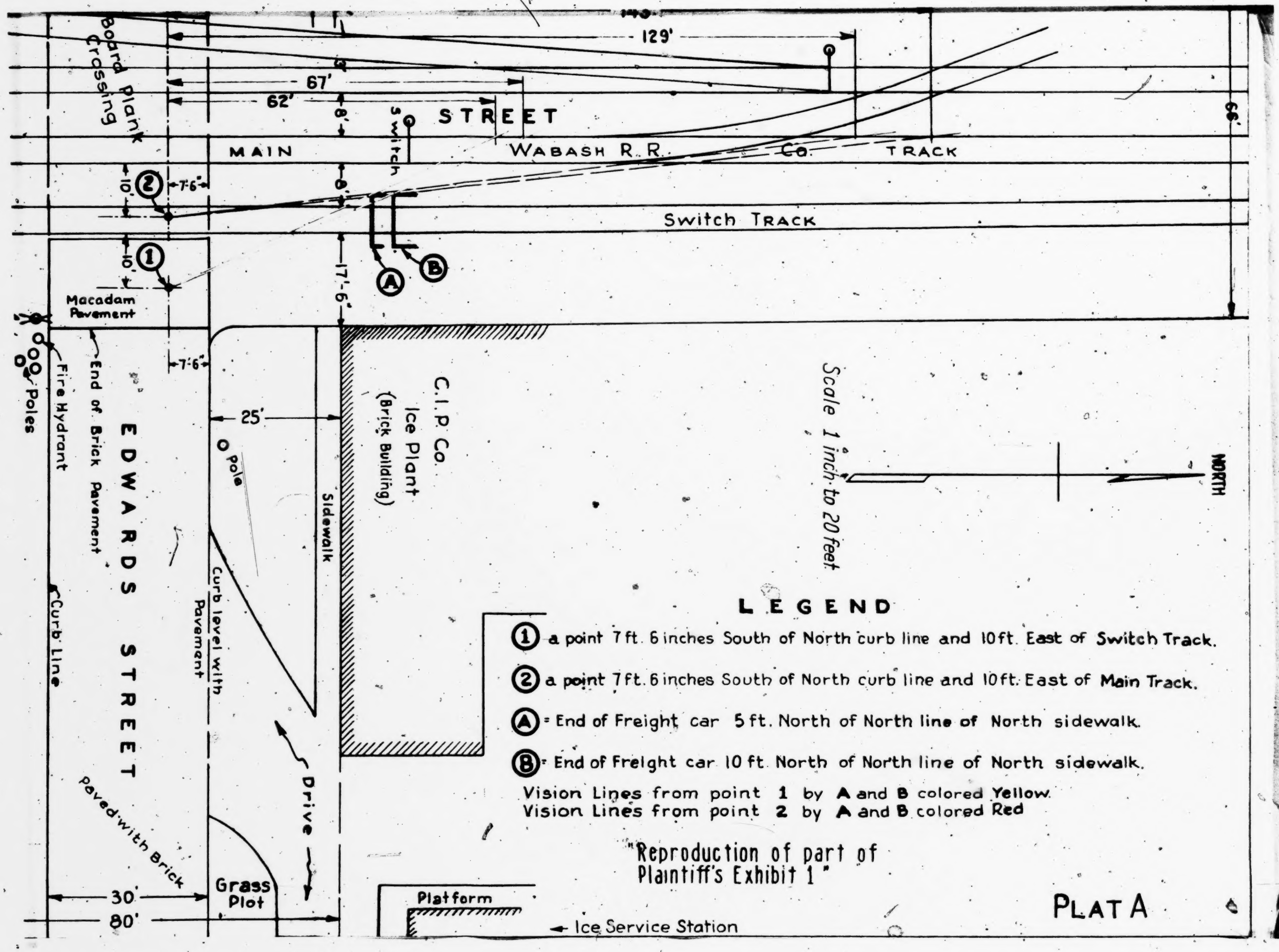
Switch Track

TENTH

Siding

Metal Storage Building

66"



LEGEND

(1) a point 7 ft. 6 inches South of North curb line and 10 ft. East of Switch Track.

(2) a point 7 ft. 6 inches South of North curb line and 10 ft. East of Main Track.

(A) = End of Freight car 5 ft. North of North line of North sidewalk.

(B) = End of Freight car 10 ft. North of North line of North sidewalk.

Vision Lines from point 1 by A and B colored Yellow.
Vision Lines from point 2 by A and B colored Red

"Reproduction of part of Plaintiff's Exhibit 1"

PLAT A

of approximately two and a half feet, which may be assumed as approximately the overhang of the engine. The dimensions of the petitioner's $1,500 Federal truck, bought two years before the injury, are not shown by the record, but information furnished by a representative of the manufacturer has enabled us to assume that the truck was approximately five feet and seven inches wide, and that as petitioner was sitting on the south side of it he would be approximately seven and a half feet south of the north curb, and that the dash or front of the cab of the truck in which petitioner was sitting, was approximately four feet and six inches back of the front bumper of the truck.

The testimony of the witnesses as to the location of the box car on the switch track varies, and therefore two positions are taken, one five feet and the other ten feet north of the north edge of the sidewalk.

The witness Ushman, who was driving his car right behind petitioner, testified with respect to the location of the cars on the switch track as follows:

> "I first noticed those cars when I stopped there, waiting for him (petitioner) to get away so I could go across. They were right about eight or ten feet from the sidewalk" (R. 35).

The witness Roland Burris testified, on redirect examination by Mr. Wines, as follows:

> "I noticed freight cars standing on the east track that morning. (Plat shown to the witness.)

Q. Can you show me on this plat how close they were to the corner?

A. It was just about along here (indicating).

Q. That is, your finger is about half an inch from this dotted line showing the building line; is that right?

A. Just a little west past the plant.

Recross-Examination, by Mr. Converse.

I think the freight cars were about six or eight feet from the sidewalk line, but I did not measure" (R. 46).

The plat on which counsel say that the witness was indicating the place the cars were located, about half an inch from the building line, was drawn to a scale of one inch equals twenty feet (see plat), and, therefore, one-half inch on the plat would equal ten feet, although the witness estimated the distance as about six or eight feet.

The witness Clarence Stanberry testified:

"There are always box cars or freight cars standing on the east track there on the north side of Edwards street. They were standing there that morning; I would judge the last car wasn't over four or five feet back" (R. 51).

The testimony of the petitioner's witnesses that the box cars were from five to ten feet north of the north edge of the north sidewalk cannot be disregarded (Chesapeake & Ohio Ry. Co. v. Martin, 283 U. S. 209, 216, 217; Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 341).

The point 1, seven feet six inches south of the north curb line and ten feet east of the east rail of the switch track, has been taken as the point where respondent believes it fairly appears from the evidence the petitioner was sitting in his truck when he stopped. The petitioner and the witness Ushman testified that petitioner stopped his truck ten or fifteen feet east of the switch track (R. 32, 34, 35). The distance of seven feet six inches from the north curb line, being one-half the distance between the north curb line and the center of the street, has been taken for the reason that the petitioner testified that he was "going alone on the north side of Edwards street near the north curb and was looking straight west," and that he "was sitting on the south side of the cab" of the truck (R. 32). The witness Ushman testified that petitioner "was driving on the north side of the street as he approached the Wabash tracks" (R. 34), and "was sitting on the left-hand side" of the truck (R. 35).

The point 2 was taken seven feet six inches south of the north curb line for the same reason as point 1, and was taken ten feet east of the east rail of the main track, for the reason that the truck would have been safely in the clear of the engine and train on the main track. While the width of the car on the sidetrack is not shown by the testimony, a width of ten feet was assumed, as general published records of railway equipment show that the width of the great majority of freight cars is less than ten feet. This would give an overhang outside the rail

None of the witnesses who saw the accident testified as to the speed of the train. Mike Ushman was in his automobile, right behind the petitioner. The petitioner (Petition for Writ, p. 7) states that Ushman testified, "that the back end of the train ran five or six hundred feet south of the Edwards street crossing before it stopped." The testimony of the witness was: "I guess the back end of the last coach was five or six hundred feet south of the Edwards street crossing" (R. 34). On cross-examination the witness testified: "I really do not know where the train did stop" (R. 35). The distance the train ran after the accident, with nothing more, would not prove the rate of speed.

Henry Roy was driving his automobile a short distance behind the petitioner, and testified: "I guess he didn't get in the middle of the track until the crash came." He then testified that he could not tell how fast the train was running (R. 38).

Henry Buckholdt, a boy almost twelve years of age at the time of the trial, testified that he was some distance east of the crossing and saw the train come along, and saw the accident (R. 36).

Clarence Stanberry did not see the train until after it stopped, but was asked to give his best judgment as to how fast it was running. He stated he could not give an estimate, but started to give a conclusion from the distance of the train down the track when it stopped. An objection to such testimony was sustained (R. 51).

The only evidence in the case relating to the speed of the train was the testimony of the witness Hodges, who was at his desk at the Springfield Produce Company, at the northeast corner of Tenth and Capitol avenue. The next street south of Capitol avenue is Jackson, and the next Edwards, that is, the witness was two blocks and the width of two streets, Capitol avenue and Jackson, north of the scene of the accident. The depot is on Tenth street. Washington is at the south end of the station, the next street is Adams, the next Monroe, and the next Capitol, where the witness worked. That is three blocks and across three streets from the depot to the place the witness was sitting at his desk, and looking through an open door about three and a half or four feet wide he saw the train pass and estimated it was running twenty-five or thirty miles an hour. There was some testimony tending to show that the train had stopped at the depot, for this witness testified as follows: "I mean to tell the jury that this train had started at the station and in running three blocks had gotten up a speed of twenty-five or thirty miles an hour."

His testimony definitely shows that it was the usual custom for the train to stop because he testified that he had taken the train hundreds of times and knew the time it was due at Springfield, and for that reason thought it was late on this morning. He said, "Very seldom it was on time; many a time I have waited for that train" (R. 50).

It may well be doubted whether the train gained a

speed of twenty-five or thirty miles an hour in going that short distance.

Evidence as to the speed of the train at Edwards street is therefore wholly lacking, and the testimony of the one witness who saw the train two blocks and across two streets north of Edwards street is so insubstantial and insufficient that it did not justify the submission of that issue to the jury under either count of the declaration (Southern Railway Co. v. Walters, 284 U. S. 190, 194; Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333).

There was no direct evidence that there was no locomotive on the switch track, except the testimony of the witness Hodges at the Produce Company's office, that he telephoned to petitioner, who was a customer of his company, to see if he needed any produce, and his wife told him petitioner "got hit with the Wabash." He called about 6:10 or 6:20. He testified, "She told me he was hit at Tenth and Edwards and I figured it was the Wabash train. **That is the only train that could have hit him.**" This witness was two blocks and across two streets north of the place of the accident and twenty-five feet from the train as it passed (R. 48, 49). This witness testified:

> "From Washington street to Edwards street there are warehouses, depots and storage houses all the way down. Those business houses are built there so they can be on sidetracks. We have a sidetrack. I don't know whether it is the same way down at the C. I. P. S. ice house" (R. 50).

The testimony whether the train was on time was conflicting. Mrs. Burris, who lived on the north side of Edwards street, and about 150 feet west of the Wabash tracks (R. 45, 46), testified:

> "I just heard the train coming and never thought to look up. I knew it went through; it was on time that day. I could hear the train rumbling down the track as it came from the north towards Edwards street". (Abs. 47, 48).

The attention of the Court is again called to the erroneous statement in the petition for the writ (page 9) that "the witness (Goetz) waved him (petitioner) on across the tracks as that platform was crowded (Tr. 39)." This would create the impression that petitioner was given some assurance of safety in crossing the tracks.

The testimony of the witness Goetz was as follows:

> "Pokora was in the habit of getting ice there in the mornings. He stopped there at the corner of the engine room to try to get a load of ice on the east side of the railroad track. Our drivers were so crowded there at the platform that I waved him up and told him he would have to wait about twenty minutes" (R. 39).

The witness also testified:

> "The wholesale platform where I was standing is about forty feet north of the sidewalk and on the east

side of the C. I. P. S. ice plant. This is where I stopped Pokora" (R. 40).

In addition to this the petitioner testified:

> "There wasn't any crossing watchman there. Nobody signaled nothing. Nobody gave me any motion to come on" (R. 33).

The statement that from the position of Goetz, on the east side of the brick building, more than one hundred feet east of the main track, as is indicated by the plat, and forty feet north of the sidewalk, the witness waved petitioner on across the tracks, is difficult to reconcile with a careful desire to accurately state the facts.

Counsel for the petitioner in his petition for the writ and apparently in oral argument contended that if the petitioner was entitled to have the case submitted to the jury it was on the third count of the declaration alleging willfulness under the rule applied in the courts of Illinois. The weakness in that contention is that this case involves a principle of general law, which must be determined and applied according to the rule and doctrine prevailing in the courts of the United States.

Federal courts in determining questions of general law are not controlled by state court decisions. Since the decision in Swift v. Tyson, 16 Pet. 3, 10 L. Ed. 865, it has been the settled general doctrine of the federal courts that they will themselves determine without regard to the decisions

of the highest courts of the state all general questions of the common law.

In Herron v. Southern Pacific Co., 283 U. S. 91, the Court, at page 93, said:

> "It does not appear to be insisted by the appellant, and it could not be maintained, that this constitutional provision must be followed by the federal courts by virtue of the Conformity Act (U. S. C., Tit. 28, Sec. 724). The state, without violating the requirements of due process, may provide such a rule for its own courts, as it may do away with the jury altogether (Chicago, Rock Island & Pacific Ry. Co. v. Cole, 251 U. S. 54, 56), but, in view of its nature and effect, the rule cannot be regarded as one that relates merely to practice or to a 'form' or 'mode of proceeding.' The provision 'cuts deep into the right, observed at common law, by which a defendant can obtain a decision by the Court, upon a proven state of facts' (Atchison, Topeka & Santa Fe Ry. Co. v. Spencer, 20 F. [2d] 714, 716). Even with respect to the burden of proof as to contributory negligence, this Court has said: 'But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case. * * * But the United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The federal courts have enforced that principle, even in trials in states which hold that the burden is on the

plaintiff.' (Central Vermont Ry. Co. v. White, 238 U. S. 507, 512). See, also, Beutler v. Grand Trunk Junction Ry. Co., 224 U. S. 85, 88."

The rule also is fully discussed and clearly stated in Black & White Taxicab & Transfer Co. v. Yellow & Brown Taxicab & Transfer Co., 276 U. S. 518.

There are scores of cases which state and apply this rule, but to cite them is unnecessary.

The federal courts do not recognize the rule as to willfulness as stated in the Illinois cases cited by petitioner.

If the allegations in the third count of the declaration state facts which would constitute a right of action recognized in the federal courts, it could only be under the last-clear-chance doctrine. But respondent contends that the last-clear-chance doctrine is not applicable to the facts set out in the declaration in this case, and that there was a total failure to prove liability under that rule.

In the case of Kansas City Southern Railway v. Ellsey, 275 U. S. 236, the Court at page 241, referring to the opinion of the court below, said:

"This language suggests that the Circuit Court of Appeals thought this case to be governed by the doctrine of the last clear chance. That doctrine, rightly applied in the Chunn case (207 U. S. 302), amounts to no more than this, that a negligent defendant will be held liable to a negligent plaintiff if the defendant, aware of the plaintiff's peril or unaware of it only through carelessness, had in fact a later opportunity

than the plaintiff to avert an accident (Grand Trunk Ry. v. Ives, 144 U. S. 408, 428; Inland and Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 558). In the cases applying the rule the parties have been engaged in independent courses of negligent conduct. The classic instance is that in which the plaintiff had improvidently left his animal tied in a roadway where it was injured by the defendant's negligent operation of his vehicle (Davis v. Mann, 10 M. & W. 546). It rests on the assumption that he is the more culpable whose opportunity to avoid the injury was later."

In Chunn v. City & Suburban Railway, 207 U. S. 302, the Court, at page 309, said:

"If she (plaintiff) carelessly placed herself in a position exposed to danger, and it was discovered by the defendant in time to have avoided the injury by the use of reasonable care on its part, and the defendant failed to use such care, that failure might be found to be the sole cause of the resulting injury."

The converse of this rule is true; that is, if the petitioner placed himself in a position of danger, which was not known or discovered by the defendant, then the petitioner failed to make a case for the jury, and it was the duty of the Court to direct a verdict for the defendant, as was done in this case.

In Woloszynowski v. N. Y. C. R. R. Co., 254 N. Y. 206, in the opinion by Chief Judge Cardozo, now Mr. Justice Cardozo, after stating the facts, it was said:

"In such circumstances a recovery in favor of the plaintiff, if sustainable at all, must rest upon the doctrine of 'the last clear chance.'

"The doctrine of the last clear chance, however, is never wakened into action unless and until there is brought home to the defendant to be charged with liability a knowledge that another is in a state of present peril, in which event there must be reasonable effort to counteract the peril and avert its consequences (citing case). Knowledge may be established by circumstantial evidence, in the face even of professions of ignorance (citing case), but knowledge there must be, or negligence so reckless as to betoken indifference to knowledge."

The decisions of this Court support the contention that there was no evidence that required or that would have justified the submission of the case to the jury on the third count of the declaration; that is, that respondent was guilty of willfully inflicting the injury upon the petitioner.

The Court, in Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 339, said:

"We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences, in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover."

The petitioner did not plead or attempt to prove that

defendant had violated or failed to comply with any statute of Illinois, any ordinance of the City of Springfield, or any order, rule or regulation of the Commerce Commission of the state relating to speed of the train or the maintaining of crossing gates or a crossing watchman. It may be assumed that if there were any such restriction or requirement the petitioner would have pleaded it. It may also be assumed that if any such restrictions or requirements were considered necessary by the public authorities they would have been made.

The undisputed evidence furnished by petitioner shows that petitioner was guilty of a reckless disregard for his own safety.

Every fact and circumstance which confronted and was then apparent to the petitioner as he approached the main track imperatively demanded that he exert increased care and vigilance, for he knew that when he stopped east of the switch track his view was obstructed by the box cars. But instead of being more careful he disregarded every requirement of safety and caution and neither stopped, looked nor listened, but, as he himself says, looked straight west and drove on the track, where he knew the train was likely to pass, for he testified: "I had seen that train go through many times on other days. Sometimes it blew whistle and sometimes not" (R. 31).

An examination of the plat introduced in evidence as Plaintiff's Exhibit No. One and the plat A incorporated in this brief shows that when petitioner stopped ten feet

east of the switch track, sitting on the south side of his truck at a distance of seven feet and six inches from the north curb line; if the box car was only five feet north of the north line of the sidewalk, it was thirty-seven and a half feet north of him and he could then have seen a distance of sixty-two feet along the main track north of the point of collision.

It is perfectly apparent that as he traveled west his range of vision to the north rapidly increased and that the train, if moving at twenty-five or thirty miles an hour, came into his range of vision soon after he started his truck and before he reached a point ten feet east of the main track.

The petitioner did not plead nor prove any excuse for failing to stop or look at a point where he could have seen the train, as he undoubtedly could have done when he was more than ten feet east of the main track. He did not allege or attempt to prove and does not now contend that he did not stop on the switch track because he feared the cars on that track might be moved and strike his truck. That suggestion and contention is made for the first time in the dissenting opinion in the Circuit Court of Appeals.

Petitioner, in effect, disavows that as an excuse for not stopping his truck on the switch track, where he could have seen the train, and apparently concedes that he stopped east of the switch track for the purpose of seeing whether there was danger in going upon that track. On page 20 of the petition for the writ he says: "Appellant

stopped his car before driving onto the east track, which was the sensible thing to do, because if an engine had been attached to the cars on the sidetrack and had started to back them south while plaintiff was on that track, he would have had no possible chance to save himself."

The cases cited in petitioner's brief and in the dissenting opinion as distinguishing the Goodman case are all clearly distinguishable from the facts in that case and from the facts in this case. In Ches. & O. Ry. Co. v. Wade, 25 F. (2d) 366, the accident happened at night. The rule in the Goodman case was approved, but the facts were held to be substantially different. In Canadian Pac. Ry. Co. v. Slayton, 29 F. (2d) 687, the accident happened about midnight. The crossing gates were up. There was no watchman and no sign stating that the gates were not in operation at midnight. The deceased was not familiar with the crossing. In Luethold v. Penna. R. Co., 33 F. (2d) 758, it was customary to have a flagman at the crossing, which distinguished that case from the Goodman case. In Teague v. St. L. S. W. Ry. Co., 36 F. (2d) 217, plaintiff was not familiar with the crossing. An electric gong at the crossing was silent and had been out of repair for three weeks, and no notice was posted that the gong was not operated. The plaintiff relied upon the gong. The train was coasting quietly and there were tank cars which obstructed the view.

In Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, the suit was based on the alleged running of a train in excess of

the speed permitted by an ordinance of the City of Detroit, and the Court held that "such an act on the part of the railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence."

It is a strange and illogical contention that petitioner urges the Court to approve that, as the danger at a crossing increases, the care which the engineer should exercise increases, but the care which the automobile driver should exercise decreases. There is neither law nor logic in such a contention.

Petitioner is in no position to complain that the Court, in Baltimore & Ohio R. v. Goodman, ruled that there might be circumstances in which the driver would be required to get out of his automobile and go forward, for he wholly failed to take the precautions which are required by all courts, federal and state, at all times, day or night, and at all places, in city or country, that the driver must look and listen, and, if necessary to see and hear effectively, he must stop his automobile.

In the case of Miller v. Union Pacific R. R. Co., ... U. S. ..., decided by this Court December 4, 1933, it was held that the contributory negligence of the driver of the automobile was clearly established under the general rule frequently stated by this Court. While the facts in that case are different from the facts in this case, and the driver in that case had better opportunity to see the approaching

train, yet the rule stated in that case, if applied to the facts in this case, would seem to require the same ruling in this case as in that. We quote from the decision in that case as follows:

> "We need do no more than refer to the case of Northern Pacific Railroad v. Freeman, 174 U. S. 379, where a person killed by a moving train at a railroad crossing well known to him, with the coming train in full view which he could have seen while forty feet distant from the track if he had looked, was held guilty of contributory negligence, because, putting aside the oral testimony, these facts demonstrated that either he did not look or took the chance of crossing before the train reached him. 'When it appears,' the Court said (pp. 383-384), 'that if proper precautions were taken they could not have failed to prove effectual, the Court has no right to assume, especially in the face of all the oral testimony, that such precautions were taken. * * * Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence.' Authority for this view was found especially in Railroad Co. v. Houston, 95 U. S. 697, 702."

There is no problem requiring solution or inference in this case, for the petitioner himself testified that he "looked straight west," that he never saw the train,

although it was certainly in plain view before he reached the danger point, and he did not even know what hit him. There could be no clearer evidence of contributory negligence, established by petitioner's own evidence.

In Chicago, M. & St. P. Ry. Co. v. Bennett, 181 Fed. 799, the Eighth Circuit Court of Appeals, in a crossing accident case, the Court (p. 803) said:

> "* * * The failure of the servants of the companies to discharge their duties in this regard is no excuse for the failure of travelers on a highway to discharge theirs. The latter are still bound by the law to listen and look effectively before they enter upon a railroad track (Railroad Co. v. Houston, 95 U. S. 697, 702, 24 L. Ed. 542; Schofield v. Chicago etc. Ry., 114 U. S. 615, 618, 5 Sup. Ct. 1125, 29 L. Ed. 224; Fletcher v. Atlantic & Pacific R. R. Co., 64 Mo. 484)."

On page 804 the Court said:

> "* * * If the plaintiff had stopped his horses just before he drove them into their dangerous position, stilled the noise of their feet, of the wagon and of the brakes, and then listened, he would probably have heard the approaching train and have escaped his injury. If he had stepped off his wagon and gone to the track before them, and looked to the east, he would certainly have seen the coming train. Looking where he could not see it and listening while other noises prevented his hearing it were futile. It is no more the exercise of ordinary care to look and listen when and where looking and listening are useless than

it is to fail to look and listen where looking and listening would be effective."

In Dean v. Chicago, B. & Q. R. Co., 211 Iowa 1347, l. c. 1350, the Court said:

"In the High case, supra (High v. Waterloo, C. F. & N. R. Co., 195 Iowa 304, 190 N. W. 331, 333), it is said: 'It is always train time at any railroad crossing,' but that 'cases may arise where, under the proven facts, the person injured has so failed to act as a man of ordinary care and prudence that the Court must hold as a matter of law that he has been guilty of contributory negligence. * * * Under certain circumstances it may be negligence for him not to stop in order to listen for a train.'

"It must be conceded that at an obstructed crossing it is the duty of the traveler to exercise a greater degree of care and caution than is incumbent upon him usually, and that there may be such circumstances in a given case that common prudence requires the traveler to stop. It is elementary that the greater the danger the greater the care and caution necessary for him to exercise to constitute ordinary or reasonable care. Even the failure of the engineer to ring the bell or sound the whistle, if such be the fact, does not relieve the traveler about to cross a railroad track from the necessity of taking ordinary precaution under the circumstances which confront him. The traveler may have the right, as a general rule, to rely on the fact that a railroad company will perform its duty, either at common law or under the statute, in the operation of its train, but this fact, per se, does

not dispense with the care to be exercised by the traveler, and he may be guilty of contributory negligence under the facts of the particular case to the contrary notwithstanding. Each case must be determined upon its own particular facts. The instant plaintiff knew that he was in a zone of danger. He was acquainted with all of the facts of his environment when he approached the tracks of the defendant railroad company. True, it is the rule ordinarily that the question involved herein must be left to the answer of the fact-finding body. The case of Hawkins v. Interurban Ry. Co., 184 Iowa 232, 168 N. W. 234, is distinguishable on the factual side from the case at bar. The instant case presents the exception to the general rule.

"This private crossing was exceptionally dangerous because trains approaching it from the west came through a deep cut, which did obscure from the view the engine in question, and did deaden somewhat the noise of its approach. The presence of weeds and brush obscured a train from the view of a traveler from the south, and no traveler in an automobile coming from the south to the tracks could see a train approaching from the west until the driver had propelled his automobile almost onto the tracks themselves, and could then see but forty to sixty feet to the west of him. The road approaching the track was rough and rutty, and steep enough that it required the plaintiff to shift from high gear to intermediate, so his car could be propelled to and over the tracks. Plaintiff, with the absolute knowledge of all these facts, knew that if he looked to the west he could not see an approaching train. Furthermore, we may take

judicial notice that a car shifted from high to intermediate gear does create and make additional noise in its operation after the shift is made. This fact would interfere somewhat with plaintiff's hearing the approach of a train. The fact is, however, that he did not stop, and the fact stands that, had he looked to the west all of the time while approaching the tracks, he could not have seen anything until his car was on, or nearly on, the tracks. Plaintiff must have known, under the circumstances, that if he did not stop and a train was approaching, which he could not see and could not hear, a collision would be inevitable.

"We hold, therefore, that the plaintiff was guilty of contributory negligence as a matter of law, and the trial court erred in overruling defendant's motion for a directed verdict."

In the case of Henderson v. St. Louis-San Francisco Railway Company, 314 Mo. 414, the Court, at page 437, said:

"The duty of plaintiff was not performed by attempting to look only from the point at which his view was obstructed (Kelsay v. R. R. Co., 129 Mo., l. c. 372). 'One approaching a railroad crossing knows that he is approaching danger, and must act in accordance with that knowledge, and in accordance with the rule of ordinary care to protect himself from danger. What is ordinary care upon his part under one state of facts might not be ordinary care under other and different facts. If objects obstruct his view, or noises interfere with his hearing, his conduct must meet these conditions before he has exercised

ordinary care for his own protection under the circumstances surrounding him' (State ex rel. Hines v. Bland, 237 S. W., l. c. 1019). There was required of the plaintiff a care commensurate with the obstructions to his view and to his hearing, before going upon a track whereon he knew trains were coming and going at almost any hour.

"Under the circumstances and under what the plaintiff himself said that he knew, we are forced to the conclusion that he did not exercise the care of an ordinarily prudent person, and for that reason the judgment should be affirmed."

Under the rule stated in these cases, as well as those cited in respondent's original brief, and under the undisputed evidence introduced by the petitioner in this case, the respondent believes that the judgments of the lower courts were correct and should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 585.—October Term, 1933.

John Pokora, Petitioner, *vs.* The Wabash Railway Company, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[April 2, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

John Pokora, driving his truck across a railway grade crossing in the city of Springfield, Illinois, was struck by a train and injured. Upon the trial of his suit for damages, the District Court held that he had been guilty of contributory negligence, and directed a verdict for the defendant. The Circuit Court of Appeals (one judge dissenting) affirmed, [66 F. (2d) 166], resting its judgment on the opinion of this court in *B. & O. R. Co.* v. *Goodman*, 275 U. S. 66. A writ of certiorari brings the case here.

Pokora was an ice dealer, and had come to the crossing to load his truck with ice. The tracks of the Wabash Railway are laid along Tenth Street, which runs north and south. There is a crossing at Edwards Street running east and west. Two ice depots are on opposite corners of Tenth and Edward Streets, one at the northeast corner, the other at the southwest. Pokora, driving west along Edwards Street, stopped at the first of these corners to get his load of ice, but found so many trucks ahead of him that he decided to try the depot on the other side of the way. In this crossing of the railway, the accident occurred.

The defendant has four tracks on Tenth Street, a switch track on the east, then the main track, and then two switches. Pokora, as he left the northeast corner where his truck had been stopped, looked to the north for approaching trains. He did this at a point about ten or fifteen feet east of the switch ahead of him. A string of box cars standing on the switch, about five to ten feet from the north line of Edwards Street, cut off his view of the tracks beyond him to the north. At the same time he listened. There was neither bell nor whistle. Still listening, he crossed the switch, and reaching the main track was struck by a passenger train

coming from the north at a speed of twenty-five to thirty miles an hour.

The burden of proof was on the defendant to make out the defense of contributory negligence. *Miller* v. *Union Pacific R. Co.*, 290 U. S. 227, 232. The record does not show in any conclusive way that the train was visible to Pokora while there was still time to stop. A space of eight feet lay between the west rail of the switch and the east rail of the main track, but there was an overhang of the locomotive (perhaps two and a half or three feet), as well as an overhang of the box cars, which brought the zone of danger even nearer. When the front of the truck had come within this zone, Pokora was on his seat, and so was farther back (perhaps five feet or even more), just how far we do not know, for the defendant has omitted to make proof of the dimensions. Nice calculations are submitted in an effort to make out that there was a glimpse of the main track before the switch was fully cleared. Two feet farther back the track was visible, it is said, for about 130 or 140 feet. But the view from that position does not tell us anything of significance unless we know also the position of the train. Pokora was not protected by his glimpse of 130 feet if the train at the same moment was 150 feet away or farther. For all that appears he had no view of the main track northward, or none for a substantial distance, till the train was so near that escape had been cut off. Cf. *Dobson* v. *St. Louis S. F. Ry. Co.*, 223 Mo. App. 842, 822; *Turbet* v. *Minneapolis, St. P. & S. S. M. R. Co.*, 164 Minn. 335, 341.

In such circumstances the question, we think, was for the jury whether reasonable caution forbade his going forward in reliance on the sense of hearing, unaided by that of sight. No doubt it was his duty to look along the track from his seat, if looking would avail to warn him of the danger. This does not mean, however, that if vision was cut off by obstacles, there was negligence in going on, any more than there would have been in trusting to his ears if vision had been cut off by the darkness of the night. Cf. *Norfolk & W. Ry.* v. *Holbrook*, 27 F. (2d) 326. Pokora made his crossing in the day time, but like the traveler by night he used the faculties available to one in his position. *Johnson* v. *Seaboard Air Line R. Co.*, 163 N. C. 431; *Parsons* v. *Syracuse, B. & N. Y. R. Co.*, 205 N. Y. 226, 228. A jury, but not the court, might say that

with faculties thus limited, he should have found some other means of assuring himself of safety before venturing to cross. The crossing was a frequented highway in a populous city. Behind him was a line of other cars, making ready to follow him. To some extent, at least, there was assurance in the thought that the defendant would not run its train at such a time and place without sounding bell or whistle. *L. & N. R. Co.* v. *Summers*, 125 Fed. 719, 721; Illinois Revised Statutes, (1933 ed.), c. 114, ¶ 84.[1] Indeed, the statutory signals did not exhaust the defendant's duty when to its knowledge there was special danger to the traveler through obstructions on the roadbed narrowing the field of vision. *Wright* v. *St. Louis S. F. Ry. Co.*, 327 Mo. 557, 566; *Hires* v. *Atlantic City R. Co.*, 66 N. J. L. 30; *Cordell* v. *N. Y. C. & H. R. R. Co.*, 70 N. Y. 119. All this the plaintiff, like any other reasonable traveler, might fairly take into account. All this must be taken into account by us in comparing what he did with the conduct reasonably to be expected of reasonable men. *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408, 417; *Flannelly* v. *Delaware and Hudson Co.*, 225 U. S. 597.

The argument is made, however, that our decision in *B. & O. R. Co.* v. *Goodman*, *supra*, is a barrier in the plaintiff's path, irrespective of the conclusion that might commend itself if the question were at large. There is no doubt that the opinion in that case is correct in its result. Goodman, the driver, traveling only five or six miles an hour, had, before reaching the track, a clear space of eighteen feet within which the train was plainly visible.[2] With that opportunity, he fell short of the legal standard of duty established for a traveler when he failed to look and see. This was decisive of the case. But the court did not stop there. It added a remark, unnecessary upon the facts before it, which has been a fertile source of controversy. "In such circumstances it seems to us that if a driver cannot be sure otherwise whether a

[1] The Illinois Act provides: "Every railroad corporation shall cause a bell of at least thirty pounds weight, and a steam whistle placed and kept on each locomotive engine, and shall cause the same to be rung or whistled by the engineer or fireman, at the distance of at least eighty rods from the place where the railroad crosses or intersects any public highway, and shall be kept ringing or whistling until such highway is reached."

[2] For a full statement of the facts, see the opinion of the Circuit Court of Appeals, 10 F. (2d) 58, 59.

train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look."

There is need at this stage to clear the ground of brushwood that may obscure the point at issue. We do not now inquire into the existence of a duty to stop, disconnected from a duty to get out and reconnoitre. The inquiry, if pursued, would lead us into the thickets of conflicting judgments.[3] Some courts apply what is often spoken of as the Pennsylvania rule, and impose an unyielding duty to stop, as well as to look and listen, no matter how clear the crossing or the tracks on either side. See e. g., *Benner* v. *Philadelphia & Reading R. Co.*, 262 Pa. 307; *Thompson* v. *Pennsylvania R. Co.*, 215 Pa. 113; *Hines* v. *Cooper*, 205 Ala. 70; cf. *Pennsylvania R. Co.* v. *Yingling*, 148 Md. 169. Other courts, the majority, adopt the rule that the traveler must look and listen, but that the existence of a duty to stop depends upon the circumstances, and hence generally, even if not invariably, upon the judgment of the jury. See, e. g., *Judson* v. *Central Vermont R. Co.*, 158 N. Y. 597, 605, 606, and cases cited; *Love* v. *Fort Dodge R. Co.*, 207 Iowa 1278, 1286; *Turner* v. *Minneapolis R. Co.*, *supra*; *Wisconsin & Arkansas Lumber Co.* v. *Brady*, 157 Ark. 449, 454; cf. *Metcalf* v. *Central Vermont R. Co.*, 78 Conn. 614; *Gills* v. *N. Y. C. & St. L. R. Co.*, 342 Ill. 455. The subject has been less considered in this court, but in none of its opinions is there a suggestion that at any and every crossing the duty to stop is absolute, irrespective of the danger. Not even in *B. & O. R. Co.* v. *Goodman*, *supra*, which goes farther than the earlier cases, is there support for such a rule. To the contrary, the opinion makes it clear that the duty is conditioned upon the presence of impediments whereby sight and hearing become inadequate for the traveler's protection. Cf. *Murray* v. *So. Pacific Co.*, 177 Cal. 1, 10; *Williams* v. *Iola Electric R. Co.*, 102 Kan. 268, 271.

Choice between these diversities of doctrine is unnecessary for the decision of the case at hand. Here the fact is not disputed that the plaintiff did stop before he started to cross the tracks. If we assume that by reason of the box cars, there was a duty to stop again when the obstructions had been cleared, that duty did not arise unless a stop could be made safely after the point of

[3]The cases are collected in 1 A. L. R. 203 and 41 A. L. R. 405.

clearance had been reached. See, e. g., *Dobson & St. Louis S. F. Ry. Co., supra.* For reasons already stated, the testimony permits the inference that the truck was in the zone of danger by the time the field of vision was enlarged. No stop would then have helped the plaintiff if he remained seated on his truck, or so the triers of the facts might find. His case was for the jury unless as a matter of law he was subject to a duty to get out of the vehicle before it crossed the switch, walk forward to the front, and then, afoot, survey the scene. We must say whether his failure to do this was negligence so obvious and certain that one conclusion and one only is permissible for rational and candid minds. *Grand Trunk Ry. Co. v. Ives, supra.*

Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. To get out of a vehicle and reconnoitre is an uncommon precaution, as every day experience informs us. Besides being uncommon, it is very likely to be futile, and sometimes even dangerous. If the driver leaves his vehicle when he nears a cut or curve, he will learn nothing by getting out about the perils that lurk beyond. By the time he regains his seat and sets his car in motion, the hidden train may be upon him. See, e. g., *Torgeson* v. *Missouri-K-T R. Co.*, 124 Kan. 798, 800, 801; *Dobson* v. *St. Louis S. F. R. Co., supra; Key* v. *Carolina & N. W. R. Co.*, 150 S. C. 29, 35; *Georgia Railroad & Banking Co.* v. *Stanley*, 38 Ga. App. 773, 778. Often the added safeguard will be dubious though the track happens to be straight, as it seems that this one was, at all events as far as the station, about five blocks to the north. A train traveling at a speed of thirty miles an hour will cover a quarter of a mile in the space of thirty seconds. It may thus emerge out of obscurity as the driver turns his back to regain the waiting car, and may then descend upon him suddenly when his car is on the track. Instead of helping himself by getting out, he might do better to press forward with all his faculties alert. So a train at a neighboring station, apparently at rest and harmless, may be transformed in a few seconds into an instrument of destruction. At times the course of safety may be different. One can figure to oneself a roadbed so level and unbroken that getting out will be a gain. Even then the balance of advantage depends on many circumstances and can be easily disturbed. Where was Pokora to leave his truck after getting